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December 17, 1999

BY HAND DELIVERY

Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: **CC Docket No. 99-295** – Bell Atlantic New York's 271 Application
Ex Parte Filing

Dear Ms. Salas:

Pursuant to the Commission's Public Notice released December 10, 1999, in the above-referenced proceeding,¹ Prism Communication Services, Inc. ("Prism") herewith comments on Bell Atlantic's *ex parte* letter dated and filed with the Commission December 10, 1999.² In its *ex parte* letter, Bell Atlantic proposes to establish a separate data affiliate ("SDA") to provide advanced services in the State of New York. Bell Atlantic proposes to base its separate data affiliate on the terms the Commission recently approved in the context of the SBC/Ameritech merger order, subject to the exceptions and clarifications set forth in the *ex parte* letter. Bell Atlantic offers the SDA proposal as additional support for approval of its 271 Application for the State of New York.

¹ In the Matter of the Application by Bell Atlantic for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York, CC Docket No. 99-295, *Public Notice*, DA-99-2779 (December 10, 1999).

² Letter dated December 10, 1999 from Thomas Tauke, Bell Atlantic, to Chairman William Kennard, CC Docket 99-295 ("Bell Atlantic's *ex parte* letter".)

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Bell Atlantic's SDA proposal is too little, too late, to support its Application. While the creation of the SDA is a step in the right direction from where Bell Atlantic currently stands with respect to its 251 obligations towards advanced services providers, the creation of the SDA should not be used to disguise the fact that Bell Atlantic clearly has not met its 271 obligations. The comments filed in this proceeding are replete with examples of how Bell Atlantic has failed to meet its statutory requirements as regards advanced services. Indeed, by its eleventh-hour proposal to establish an SDA, Bell Atlantic all but admits that it currently does not provide services and facilities to competing advanced services providers on a non-discriminatory basis, as required by the Act. Accordingly, the Commission must reject Bell Atlantic's Application.

In an effort to remedy the problems currently facing advanced services providers, however, the Commission should require Bell Atlantic to establish an advanced services affiliate that is truly separate and distinct from Bell Atlantic-New York and, within a reasonable time after the SDA has been operating, evaluate the effectiveness of the SDA in ensuring that Bell Atlantic meets its statutory obligations with respect to advanced services providers. At that time, the Commission could reevaluate the merits of Bell Atlantic's Application. This proposal will allow the FCC to approve Bell Atlantic's application at such time that it finds that Bell Atlantic has truly met the requirements of the Act, not on Bell Atlantic's promise to comply with Section 271 in the future. That is, the proposal will put the horse, once again, before the cart.

A. Bell Atlantic has not met the requirements of Section 271 and its Application should be rejected.

In order for the Commission to approve Bell Atlantic's application, Bell Atlantic must show that it currently meets the 271 checklist requirements.³ Indeed, the Commission has ruled that "a BOC's promises of *future* performance to address particular concerns raised by commenters have no probative value in demonstrating its *present* compliance with the requirements of Section 271 ... [w]hen a BOC files its application, it must demonstrate that it already is in full compliance with the requirements of section 271."⁴ Accordingly, future performance is not sufficient for the Commission to pass favorably on Bell Atlantic's application.

³ 47 U.S.C. § 271(d)(3).

⁴ Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan, 12 FCC Rcd 20543, at ¶ 55 ("Ameritech Michigan Order"); In the Matter of Application of BellSouth Corporation, *et al.* Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in South Carolina, CC Docket No. 97-208, *Memorandum Opinion and Order*, FCC 97-418 at ¶ 38 (rel. December 24, 1997).

Notwithstanding the foregoing, Bell Atlantic continues to try to support its Application with promises that it has the incentives and will meet its 271 obligations in the future. First, Bell Atlantic points to the DSL collaborative efforts undertaken under the eye of the New York Public Service Commission to address the specific concerns of DSL providers in the New York market.⁵ Second, Bell Atlantic points to its Performance Assurance Plan to show that it has incentives to meet its statutory obligations in the future.⁶ For its hat trick, Bell Atlantic now proposes to establish the SDA, which is intended to “ensure that services and facilities are provided to xDSL providers on a non-discriminatory basis.”⁷

The Commission should not rely upon Bell Atlantic’s promises of future performance to approve Bell Atlantic’s Application. For example, while Prism hopes that the DSL collaboratives before the New York Commission will diminish the problems facing all advanced services providers, there is no assurance that this will be the case. Indeed, although the collaboratives have been ongoing for several months, DSL carriers still experience significant problems in the ordering, provisioning and maintenance of xDSL services. Similarly, while Prism would hope that the creation of an SDA that is truly separate from Bell Atlantic would ease the problems facing all advanced services providers, there is no guarantee that this will be the case. Only time will tell whether the SDA improves Bell Atlantic’s performance and eliminates the non-discriminatory treatment dominating the advanced services market. There is too much uncertainty about the future effectiveness of the SDA to rely on that mechanism to enforce Bell Atlantic’s adherence to its statutory obligations.

In short, Bell Atlantic’s promises of future performance are irrelevant to the question at hand: does Bell Atlantic currently meet the requirements of Section 271 of the Act? The record in this proceeding makes clear that it does not with respect to the provision of advanced services. Accordingly, Bell Atlantic’s Application should be denied. Bell Atlantic should not be allowed to rely upon its SDA proposal, a last-ditch effort to support its Application, which amounts to nothing more than an end-run around the requirements clearly set forth in Section 271 of the Act.

⁵ Bell Atlantic’s Application at 21.

⁶ Bell Atlantic’s Application at 74-78.

⁷ Bell Atlantic’s *ex parte* letter at 1.

B. The SBC/Ameritech Order is irrelevant to the Commission's assessment of whether Bell Atlantic has met its 271 obligations.

Bell Atlantic seeks to base its SDA on certain of the terms and conditions of the separate data affiliate established in connection with the SBC/Ameritech merger.⁸ Bell Atlantic's logic is that if the Commission approved the SBC/Ameritech merger based, in part, on the establishment of the advanced services separate affiliate,⁹ the Commission should likewise approve its 271 Application based, in part, on the establishment of the SDA. Bell Atlantic's reliance upon the SBC/Ameritech Order is misplaced.

The Commission's review of the SBC/Ameritech separate data affiliate was undertaken in the context of a merger application, not a 271 Application. A different standard applies to evaluate the appropriateness of a separate data affiliate in the context of a merger. When the Commission was assessing the need for a separate data affiliate in connection with the SBC/Ameritech merger, it was not charged with determining whether the creation of such a separate data affiliate would ensure that SBC/Ameritech would comply with their 251 obligations with respect to advanced services. Indeed, in the SBC/Ameritech Order, the Commission stated that "[a]ll of the conditions we adopt today are merger specific and not determinative of the obligations imposed by the Act." In this case, however, the Commission is charged with determining whether Bell Atlantic meets its statutory obligations.

Accordingly, the fact that the Commission approved the establishment of the advanced services affiliate in connection with the SBC/Ameritech merger is irrelevant to whether the Commission should approve Bell Atlantic's Application based, in part, on a similar separate data affiliate.

C. The SDA proposed by Bell Atlantic does not ensure true structural separation.

The purpose of the SDA is to ensure that Bell Atlantic's provision of advanced services through a separate affiliate would ensure that services and facilities are provided to competing advanced services providers on a non-discriminatory basis, in accordance with the Act. The SDA proposed by Bell Atlantic does not provide true structural separation and, therefore, cannot guarantee that Bell Atlantic meets its statutory obligations. Specifically, Prism

⁸ Id.

⁹ In Re Applications of Ameritech Corp. and SBC Communications for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines, *Memorandum Opinion and Order*, CC Docket No. 98-141 at ¶¶ 1-14 (rel. October 8, 1999) ("SBC/Ameritech Order").

believes that the following conditions of Bell Atlantic's commitment to establish an SDA will undermine the goal of nondiscriminatory treatment in the advanced services arena.

- In many instances, the SDA proposal refers specifically to Bell Atlantic's obligations for "xDSL services."

The SDA should not be limited to ensuring that Bell Atlantic meets its obligations with respect to "xDSL services," but should apply to all advanced telecommunications services. Prism is an advanced services provider which uses a technology that does not fit neatly within the "xDSL services" box and, by experience, oftentimes does not meet Bell Atlantic's particular prescription for xDSL services. Moreover, while xDSL may be today's flavor of advanced telecommunications services, the SDA should apply to all future advanced services. Accordingly, the SDA proposal should make clear that its obligations extend to all advanced telecommunications services.

- Bell Atlantic may, on an exclusive basis, complete the sale of, up to and including the taking of an order for, advanced services on behalf of its SDA. This includes allowing Bell Atlantic's representatives to (i) discuss the SDA's advanced services on in-bound calls, (ii) make out-bound calls to discuss advanced services with a customer and obtain the customer's agreement to purchase the SDA's advanced services, (iii) review loop information during a sales discussion with a customer to determine if it is possible to provide an advanced service to the customer, provided that the same loop information is made available to unaffiliated advanced services providers, and (iv) review advanced services availability information provided to Bell Atlantic by the SDA to determine whether the affiliate offers a certain advanced service in the area where the customer resides.¹⁰

For obvious reasons, Prism strongly contests these conditions. The very purpose of this proceeding is to determine whether Bell Atlantic has opened up the local exchange market and, as specifically regards the *ex parte* letter, to determine whether the separate affiliate would ensure nondiscriminatory treatment for competitive advance services providers. The foregoing conditions do exactly the opposite: they ensure that competitive advanced services providers will continue to receive nondiscriminatory treatment at the hands of Bell Atlantic.

These conditions are not only unreasonable on their face but, more importantly, will be impossible to enforce, particularly with respect to the

¹⁰ SBC/Ameritech Order at ¶ 4(a)(6)(b) (incorporated into Bell Atlantic's *ex parte* letter.)

supposed non-discriminatory precautions. For example, Prism questions how the requirement that Bell Atlantic representatives will receive only the same access to loop qualification as unaffiliated providers will be enforced. Moreover, Since Bell Atlantic will be taking the order and qualifying the loop for an advanced service, why don't they also just call down the hall to order the facility and let their SDA know exactly when it will be installed. Clearly, this is not the same treatment that other advanced services providers will receive from Bell Atlantic.

Prism further takes issue with the resulting market power and incentives for cross-subsidization that may arise in connection with Bell Atlantic's ability to bundle voice, data and Internet services.

- A Bell Atlantic representative may, on an exclusive basis on behalf of the SDA, perform certain tasks to service the account of the SDA's customer, including: (i) on-going customer notification of service order progress; (ii) response to customer inquiries regarding the status of an order; (iii) changes to customer information; and (iv) receipt of customer complaints.¹¹

Allowing Bell Atlantic the right to service the SDA's accounts in this way discriminates against competitive advanced services providers. Many of the problems Prism has experienced with Bell Atlantic in New York relate to Prism's inability to obtain timely and accurate information from Bell Atlantic on the status of orders (e.g., completions, jeopardies and the reasons for unfulfilled orders.) Prism needs this information to efficiently schedule installations with its technicians and customers. The foregoing conditions allow Bell Atlantic to give real-time responses (which, presumably will be accurate) to the SDA's customers, when other advanced services providers are unable to do so.

- Bell Atlantic will provide funding to, and name a management team for, the SDA.¹²

Prism, and other advanced services providers, were required to obtain their own funding and managerial and technical expertise. Bell Atlantic will have a leg up on its competitors if it is allowed a wholesale transfer of funds and managerial staff to its affiliate. The SDA must be required to obtain its own funding.

¹¹ SBC/Ameritech Order at ¶4(I) (incorporated into Bell Atlantic's *ex parte* letter.)

¹² Bell Atlantic's *ex parte* letter at 2.

- Bell Atlantic will give substantial weight to the performance of the SDA in setting the annual bonuses paid to officers and management employees of the SDA.¹³

As the purpose of establishing a totally separate SDA is to provide Bell Atlantic an incentive to provide advanced services and facilities on a non-discriminatory basis, it seems counterintuitive to gauge the performance of the SDA's management. That is, the performance of the SDA would be improved if Bell Atlantic fails to maintain true separation and, instead, provides preferential treatment to its affiliate. The true measure for success is whether advanced services providers are obtaining nondiscriminatory treatment from Bell Atlantic, not whether Bell Atlantic's SDA is performing well. Prism therefore questions the logic of this condition.

Moreover, there are many questions left unanswered by Bell Atlantic's SDA proposal related to the relationship between Bell Atlantic and its SDA. For example, what OSS systems will be available to the SDA? Does the SDA contemplate entering into an Interconnection Agreement with Bell Atlantic and will Bell Atlantic honor its 252(i) obligations with respect to any such interconnection agreement? In that vein, will all the provisions of the Interconnection Agreement be available to competitors, or just certain provisions? How will competitors enforce the nondiscriminatory provisions of the SDA proposal (e.g., the access to loop qualification information)? On what terms and conditions does Bell Atlantic contemplate transferring equipment and customer base to the SDA? What joint marketing initiatives are contemplated between Bell Atlantic and its SDA? Prism submits that these and other issues need to be fleshed out to ensure a truly structurally separate affiliate.

For these reasons, Bell Atlantic's SDA proposal does not ensure true structural separation and, therefore, cannot guarantee nondiscriminatory access to services and facilities by competitive advanced services providers.

D. The Commission should require Bell Atlantic to establish a truly separate SDA to try to ameliorate the discriminatory treatment of advanced services providers.

The record in this proceeding is fraught with examples of how Bell Atlantic has failed to meet its statutory obligations with respect to advanced services. Competitive providers have described in detail the ordering, provisioning and maintenance problems they experience in dealing with Bell Atlantic. In an attempt to alleviate these problems, Prism recommends that the Commission require Bell Atlantic to establish an advanced services affiliate that is truly

¹³ Id.

separate from Bell Atlantic. The Commission may then subsequently review whether the SDA is effectively ensuring that Bell Atlantic complies with its statutory obligations and, therefore, whether Bell Atlantic's 271 Application meets the statutory requirements.

This proposal will allow the FCC to approve Bell Atlantic's application at such time that it complies with the requirements of Section 271, rather than approving the application prematurely, based on Bell Atlantic's promise to comply with Section 271 in the future. The Commission should not approve Bell Atlantic's Application in haste on the hope that the SDA will eliminate the discriminatory treatment of advanced services providers. The Commission should assess the effectiveness of a truly separate SDA and then pass on the merits of Bell Atlantic's Application.

The Commission must ensure, however, that the separate data affiliate is truly separate. To that end, Prism suggests that the Commission consider the deficiencies in Bell Atlantic's SDA proposal identified above. Moreover, the Commission should ensure that the separate affiliate complies with the structural and transactional separation requirements and nondiscrimination safeguards of Section 272 of the Act. In particular, the Commission should require the separate affiliate to meet the following requirements: (i) to have separate officers, directors, and employees; (ii) to not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of Bell Atlantic; (iii) to conduct all transactions with Bell Atlantic on an arm's length basis; (iv) to account for all transactions with Bell Atlantic in accordance with generally accepted accounting principles; and (v) to not allow Bell Atlantic to market or sell its services.¹⁴

E. Conclusion

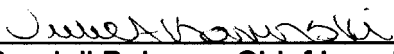
Bell Atlantic's eleventh-hour attempt to salvage its 271 Application through the proposal of a separate data affiliate, as specified by Bell Atlantic, is inadequate. Bell Atlantic has not shown that it meets the requirements of Section 271 of the Act and, therefore, its Application must be rejected. In an effort to improve and eliminate the discriminatory treatment of advanced services providers, however, the Commission should require Bell Atlantic to establish a truly structurally separate advanced services affiliate and continue to monitor the effectiveness of such an affiliate in ensuring that Bell Atlantic meets its statutory obligations. At such time that the Commission finds that Bell Atlantic has truly met its requirements under the Act, it should then, and only then, approve Bell Atlantic's 271 Application.

¹⁴ 47 U.S.C. §272.

In accordance with the Commission's rules and directives in this proceeding, I am hereby submitting an original and two (2) copies of this letter.

Respectfully submitted,

PRISM COMMUNICATION SERVICES, INC.



Randall B. Lowe, Chief Legal Officer
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/jak

cc: Attached service list

CERTIFICATE OF SERVICE

I, Jane L. Hall, hereby certify that a true and correct copy of the Comments of Prism Communication Services, Inc. to Bell Atlantic's December 10th *ex parte* letter in CC Docket No. 99-295 was hand delivered to the following individuals, this 17th day of December, 1999.

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